ASSUNTA HOSPITAL v. DR. A. DUTT

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Syed Othman F.JJ.) May 29 & November 5, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 144 of 1976]

Administrative Law — Application for prohibition — Dismissal of medical officer — Reference by Minister to Industrial Court — Whether Court had jurisdiction — Industrial Relations Act, 1967, ss. 20, 23 & 29.

Industrial Relations — Dismissal of medical officer — Reference by Minister to Industrial Court — Jurisdiction — Whether reference could be heard by Chairman alone — Industrial Relations Act, 1967, ss. 20, 23 & 29.

In this case the respondent claimed that he had been dismissed without just cause and excuse and eventually the matter was referred by the Minister to the Industrial Court. The appellant applied to the High Court for an order of prohibition on the following grounds (a) the respondent was a non-citizen (b) he was not a workman under the Industrial Relations Act, 1967 and (c) the Chairman should not have sat alone, without a panel, without the consent of the parties. The learned judge of the High Court dismissed the application — see [1980] 1 M.L.J. 96. The appellant appealed.

Held: (1) the case came squarely within section 20(3) of the Industrial Relations Act and therefore could be heard by the Chairman sitting without a panel of advisers. The learned judge was correct in dismissing this ground for an order of prohibition as being without substance;

(2) the non-citizenship status of the respondent was irrelevant for the purpose of the proceedings;

(3) the question whether the respondent was a workman was clearly within the province of the Chairman to find in a reference to him of the workman's representations of dismissal without just cause or excuse;

(4) once the Minister decides to make a reference and his order is not set aside, the Industrial Court is seized with jurisdiction to hear the case and it is implicit in the Act that the Industrial Court must exercise that jurisdiction.

Cases referred to:-

(1) *Allen* v. *Sir Alfred McAlpine & Sons Ltd.* [1968] 2 Q.B. 229, 243.

(2) *Tolley* v. *Morris* [1979] 1 W.L.R. 592.

(3) *South East Asia Firebricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees' Union & Ors.* [1980] 2 M.L.J. 165; [1980] 2 All E.R. 689.

(4) *Parochial Church Council of St. Magnus — the — Martyr* v. *Chancellor of London* [1923] P. 38, 44.

(5) *R.* v. *Kensington Commissioners, ex parte Aramayo* [1916] 1 A.C. 215.

(6) *R.* v. *Kensington Commissioners, ex parte Polignac* [1917] 1 K.B. 486.

(7) *R.* v. *Swansea Income Tax Commissioners* [1925] 2 K.B. 250, 257-8.

FEDERAL COURT.

D. Puthucheary for the applicant.

G. Sri Ram for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): Dr. A. Dutt was a radiology consultant and was employed by the Assunta Hospital under a contract. He was also a non-citizen and his holding the appointment was dependent on his stay in the country for which a visit pass was necessary and the issue of a work permit from the Department of Immigration.

On February 29, 1976, he was given the contractual 3 months' notice of termination, but at the same time he was offered a new contract on somewhat reduced terms. He refused the new offer and the Hospital regarded his contract as terminated. Dr. Dutt took another view. He considered that he had been dismissed without just cause and excuse and he made representations to the Director-General of the Ministry of Labour and Manpower to be reinstated in his former employment under the relevant provisions of the Industrial Relations Act, 1967, (the Act). In due course of time, after reconciliation failed, the Minister referred the representations to the Industrial Court for an award. The reference was registered as Industrial Court Case No. 83 of 1976.

The reference was not greatly to the liking of the hospital. Despite the failure of its representations to the Minister, it continued to oppose the hearing of the reference. After the case was registered, it applied after obtaining leave from the High Court at Kuala Lumpur for an order of prohibition to prevent the Chairman of the Industrial Court, before whom the case was placed, from hearing the case. A High Court Judge heard the application on October 29, 1976 and the very next day, that is on October 30, 1976, he dismissed the application. The hospital promptly appealed to the Federal Court. There was some delay in supplying the grounds of decision and regretfully it had to be said as a fact that the delay and the notice of appeal were made to be the reasons and the occasions for dragging out the hearing in the Industrial Court. When the appeal came before us and it was dismissed after both counsel were heard, the Industrial Court case concluded very soon afterwards, but in effect, a delay of some 3 years or so had resulted. "In these ... cases, the law's delays have been intolerable. They have lasted so long as to turn justice sour." These are the words of Lord Denning M.R. in *Allen* v. *Sir Alfred McAlpine & Sons Ltd.*,[1] echoed by Lord Wilberforce in *Tolley* v. *Morris*[2] at page 593. Whatever the cause of the delay, whether it is want of prosecution or any other cause, it occasions a failure of justice.

In applying for leave for the order of prohibition, the hospital gave three grounds: first, Dr. Dutt was a non-citizen, secondly, he was not a workman under the Industrial Relations Act, 1967 and thirdly, the Chairman should not be sitting alone, without a panel, without the consent of the parties, section 23(4) of the Act notwithstanding. These grounds found no favour with the judge. With respect, we entirely agreed with the judge and we dismissed the appeal. We now give our reasons, since they are asked for, even though no appeal had been lodged and the Industrial Court had since handed down an award.

Under section 23, the Industrial Court may sit in two or more divisions with the same or different Chairman, a division is to consist of a Chairman and a panel of advisers, but subsection (4) provides that

"(4) Notwithstanding the foregoing subsections, for the purpose of dealing with any reference to the court under section 20(3), a Division may be constituted by the Chairman sitting alone."

Thus, for a case which comes under section 20(3), the Chairman may sit alone without a panel and it is not necessary that to do so he must obtain the consent of the parties. A reference under section 20(3) is one in respect of a workman who is not a member of a trade union of workers. Dr. Dutt was not such a member, to the clear knowledge of the hospital and

its advisers. His case therefore came squarely under section 20(3) and might be heard by the Chairman sitting without a panel of advisers. The judge was entirely correct in dismissing this ground for an order of prohibition as being without any substance.

As for the non-citizenship status of Dr. Dutt, we shared the astonishment of the judge at the relevance of this point. Our views can be stated shortly; whether Dr. Dutt can get an extension of his visit-pass so as to be able to stay in this country or the issue of a work-permit in order to be able to take up the appointment are not matters that can influence the court in the proper exercise of the jurisdiction conferred on it by the Minister's reference of the representations for reinstatement. If an order is made ordering reinstatement and the workman is unable to obtain either the visit pass or the work-permit, the employer would not be in contempt of the order. It is for the workman to make the order effective. All that the hospital had to do is to make the post available to the workman. As for any suggestion that the order for reinstatement would influence the Ministry of Home Affairs to issue the visit pass or the work-permit, there cannot be any truth in it, and it cannot possibly be said that the Ministry of Home Affairs is bound to comply with the order for reinstatement. In any event, it is of no concern to the hospital.

The question whether Dr. Dutt was a workman within the definition in the Act so as to avail himself of the provisions thereof, in our view and with respect, is a mixed question of fact and law and clearly within the province of the Chairman to find in a reference to him of the workman's representations of dismissal without just cause or excuse.

The Act as stated in the heading is an Act "to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom." It therefore provides, *inter alia,* for the case of a workman who considers his dismissal to be without just cause or excuse. Section 20 is such a provision for a workman not a member of a trade union. Subject to the steps in section 20(2) to be taken for an expeditious settlement by conciliation and if such steps failed, the Minister may, if he thinks fit, refer the representations to the court for an award. The discretion is with the Minister whether or not to make the reference. In the case under consideration we are not concerned with any question whether the Minister has or has not exercised his discretion correctly. If it should be such a case, the action is not to stop the Industrial Court from hearing the reference but by some application by which the order of reference can be impugned. Once the Minister decides to make the reference and his order is not set aside, the Industrial Court is seized with jurisdiction to hear the case and it is implicit in the Act that the Industrial Court must exercise that jurisdiction. Failure to do so may well result in an order for *mandamus.* Section 29 of the Act spelling out the powers of the court is expressed in discretionary terms. The court may take any of the steps set out in the section, and generally "direct and do all such things as are necessary or expedient for the expeditious determination of the trade dispute or the reference under section 20(3)." But there can be, on a proper construction of this section, no doubt whatsoever that it would be a dereliction of duty to renounce the jurisdiction to hear the reference. In the exercise of its jurisdiction in a reference under section 20(3), the court has a duty to come to a first finding whether or not the claimant was or was not a workman within the definition of a workman in the Act, and secondly whether or not the workman has been dismissed without just cause or excuse. If it arrives at the decision that the dismissal was just or with excuse, it may refuse to make an award. But if in its finding the dismissal was without just cause or excuse, it has the power in section 30 to make an award including an interim award relating to all or any of the issues, having "regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries": subsection (4). And clearly, the supervisory power of the High Court over the Industrial Court in the exercise of its jurisdiction is, having regard to the ouster provisions in the then section 32(3) of the Act, limited to cases where the Industrial Court has not observed the rules of natural justice or has acted in bad faith or has committed a jurisdictional error: *South East Asia Firebricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees' Union & Ors.*[3] That is a case of an application for *certiorari* but the same principle applies. An order of prohibition lies to restrain an inferior court from exceeding its jurisdiction. Excess of jurisdiction includes a case where the error of the inferior court involves doing "something which is contrary to the general laws of the land", or "so vicious as to violate some fundamental principle of justice": *Parochial Church Council of St. Magnus-the-Martyr* v. *Chancellor of London.*[4] A court cannot give itself jurisdiction by wrongly deciding that facts exist upon which the jurisdiction depends, unless it has been given jurisdiction to decide the facts: *R.* v. *Kensington Commissioners, ex parte Aramayo;*[5] *R.* v. *Kensington Commissioners, ex parte Polignac;*[6] *R.* v. *Swansea Income Tax Commissioners.*[7] Enough has been said to show conclusively that the instant case is one in which jurisdiction was given to the Industrial Court to find certain facts and on these facts to decide whether or not to make an award. Prohibition under these circumstances could not lie. With respect, there appeared to have been some confusion in the hospital in equating a certain view of the validity of the Minister's order with the jurisdiction of the Industrial Court which comes into existence on such a reference.

It was suggested, though somewhat tentatively that the Industrial Court could not award compensation in lieu of reinstatement. At the time of the appeal, the court had not made any award of compensation and no necessity arose to determine this question.

The appeal was dismissed with costs.

Appeal dismissed.

Solicitors: *Skrine & Co.; Sri Ram, Chan & Chia.*